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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-720

BANK OF HENDERSONVILLE,
Petitioner,

VS.

RED BARON FLYING CLUB, INC.,
Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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TABLE OF CONTENTS

	Page
Opinion below	3
Jurisdiction	4
Question presented	4
Statutes involved	4
Statement of the case	4
Argument	6
Conclusion	11
Appendix:	
Convention on International Recognition of Rights in Aircraft (the Mortgage Convention), Geneva, June 1948, Articles I, II, III	A-1, A-2

TABLE OF AUTHORITIES CITED

Cases

	Page
Cessna Finance Corporation v. Skyways Enterprises Inc. and First National Bank and Trust Company, Kentucky Court of Appeals, April 21, 1978	9
Dawson v. General Discount Corporation, 82 Ga.App.29, 60 SE.2d 653 (1950)	9
Dowell v. Beech Acceptance Corp. Inc., 3 Cal.3d 544, 94 Cal. Rptr. 1, 476 P.2d 401 (1970), cert. denied, 404 U.S. 823 (1971)	7, 8, 11
First National Commerce and Finance Co. v. The Indiana National Bank, Florida 3d Dist. Crt. of Appeal, July 5, 1978	9
Haynes v. General Electric Credit Corp., (1977) 432 F.Supp. 763	9
In re Veterans Express Co., 76 F.Supp. 684 (D.N.J. 1948)	9
Marsden v. Southern Flight Service, Inc., 227 F.Supp. 411 (M.D.N.C. 1961)	9
Northern Illinois Corp. v. Bishop Distributing Co., 284 F.Supp. 121 (W.D. Mich. 1968)	9
Richard O'Neill v. Barnett Bank of Jacksonville, N.A. 360 South 2d 150 (Fla. 1st DCA 1978)	8
Sanders v. M.D. Aircraft Sales, Inc., 575 F.2d 1086 (3rd Cir. 1978)	9
Texas National Bank of Houston v. Aufderheide, 235 F.Supp. 599 (E.D. Ark. 1965)	9

Statutes

Federal Aviation Act of 1958:	
49 U.S.C. Section 1401-1406	4
49 U.S.C. Section 1403	6, 7, 9, 10
28 U.S.C. Section 1257(3)	4

Miscellaneous

Convention on International Recognition of Rights in Aircraft (The Mortgage Convention), Geneva, June 1948 Articles I, II, III	10
Convention on International Civil Aviation, Chicago (1944)	10

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Now Comes the Aircraft Finance Association and moves that this Court permit it to file a brief amicus curiae in support of the Petition for Writ of Certiorari to the Supreme Court of Tennessee, and in support thereof says as follows:

1. The Aircraft Finance Association is an organization of aircraft lenders, manufacturers, and interested persons who are concerned and active in their commitment to working within the system for the maintenance and improvement of their society; specifically in support of promoting the availability of aircraft financing while protecting the lender. Its request for permission to appear as amicus curiae on behalf of the petitioner is another effort to assure that momentum towards these avowed goals is continued.

2. The interest of the Aircraft Finance Association in this case arises from the fact that its members are faced daily with situations in the financing of aircraft in which the same issue arises, namely, is the lender's priority position protected by recordation of his security interest with the Federal Aviation Administration despite state laws to the contrary.

In the instant case the Petitioner argues in his Petition for Writ of Certiorari from the confines of the particular facts in his case and the Tennessee law. A more complete argument on the far-reaching ramifications of the principles espoused by the Tennessee Court of Appeals and the magnitude of the increasing conflict among the decisions of various State and Federal Courts can be provided by the Aircraft Finance Association.

3. The Aircraft Finance Association has received the consent of the Bank of Hendersonville, the petitioner herein, but has not received the consent of the respondent herein, to permit the filing of its amicus curiae brief.

WHEREFORE, movant respectfully requests that it be permitted to file its amicus curiae brief in this action.

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In the Supreme Court

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OCTOBER TERM, 1978

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BANK OF HENDERSONVILLE,
Petitioner,
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Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Aircraft Finance Association, together with the petitioner, Bank of Hendersonville, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this proceeding on July 31, 1978, which judgment denied the Petition of the Bank of Hendersonville for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of Tennessee, Middle Section, entered on December 2, 1977.

OPINION BELOW

The opinion of the Court of Appeals of Tennessee, Middle Section at Nashville, and the Memorandum Opinion of the Chancellor of the Chancery Court of Putnam County, Tennessee, are set forth in the Petitioner's Appendix to his Petition for Writ of Certiorari to the Supreme Court of Tennessee and therefore are not repeated herein.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). The judgment of the Supreme Court of Tennessee was entered on July 31, 1978, and a Petition for Certiorari was filed within ninety days of that date.

QUESTION PRESENTED

Does the recordation system established under the Federal Aviation Act of 1958, 49 U.S.C. 1401 et seq., preempt state law as to the priority between a security holder who has properly recorded his interest under 49 USC 1401, et seq., and a subsequent buyer in the ordinary course of business from a dealer?

STATUTES INVOLVED

The Federal Aviation Action of 1958, 49 U.S.C. 1401-1406, as reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

All of the facts stated by the Petitioner will not be restated by Counsel Amicus Curiae. The operative facts as viewed from the perspective of this Brief are as follows:

The Bank of Hendersonville financed the inventory of a dealer in aircraft, Mid-South Aviation, Inc. The loan was secured by the dealer's aircraft inventory. The note and security agreement evidencing such secured interest were duly filed with the Federal Aviation Administration at the central registry on June 25, 1974. Such recordation was pursuant to Federal Aviation Act of 1958, 49 USC 1401-1406.

Thereafter, the Red Baron Flying Club, Inc., on August 2, 1974 purchased an aircraft from Mid-South Aviation Inc., and filed a Bill of Sale with the Federal Aviation Administration. Red Baron Flying Club Inc. did not inquire of the Federal Aviation Administration as to any secured interest in the aircraft.

Mid-South Aviation Inc. was subsequently adjudicated a bankrupt. The Bank of Hendersonville made demand on the Red Baron Flying Club Inc. for the aircraft. The Red Baron Flying Club Inc. refused and demanded that the Bank of Hendersonville release its security interest in the aircraft.

The Chancery Court of Putnam County, Tennessee, held that the Federal Aviation Act of 1958, in setting up a central recordation system, pre-empted state law regarding purchasers in the ordinary course of business from a dealer. The decision was reversed by the Court of Appeals of Tennessee, Middle Section. The Court determined that under Tennessee law, a purchaser in the ordinary course of business was superior to the recorded security interest of the Bank of Hendersonville and that the recordation system under the Federal Aviation Act did not pre-empt state laws governing such interests.

On July 31, 1978, the Supreme Court of Tennessee denied the Petition of the Bank of Hendersonville for a Writ of Certiorari.

The security interest of the Bank of Hendersonville remains of record at the Federal Aviation Administration and remains as a cloud on the title to the aircraft.

ARGUMENT

It is respectfully submitted that the court should grant certiorari in this case which involves an important federal question, as the decision of the Court of Appeals of Tennessee is in direct conflict with those of other courts.

A substantial question is presented in that yearly, thousands of aircraft are purchased from dealers and financed by lenders nationwide. The conflicting decisions arising from various state courts and United States District Courts have thrown the aviation finance industry into a state of chaos and uncertainty. Every lender who finances the inventory of a dealer and every purchaser of an aircraft is affected by the question presented. This federal question is one of substance and has not previously been decided by this court. Without clarification by this court, litigation over the intent and meaning of 49 USC 1401, et seq., particularly Section 1403 will continue. The final result will be numerous and conflicting interpretations of the effect of recordation under the Federal Aviation Act.

In rendering its decision, the Court of Appeals of Tennessee considered the effect of Title 49, Section 1403 as it pertains to title in aircraft. The Tennessee court determined that a properly recorded interest under such section, even though previous in time to a subsequent sale, does not obtain priority by virtue of such recordation under the Commercial Code of Tennessee. Tennessee law grants priority to a purchaser from a dealer despite his failure to make any effort to ascertain the existence of any prior security interests in the aircraft by checking with the central records at the Federal Aviation Administration.

The Tennessee Court of Appeals is not the only court to consider the effects of recordation on competing interests in an aircraft. Various state courts and United States District Courts have considered the issue and come to different results.

The California Supreme Court in *Dowell v. Beech Acceptance Corp.*, (1971), 476 P.2d 401, reached the opposite conclusion of the Tennessee Court in a similar fact situation. In *Dowell,* supra, an aircraft was purchased from a Beechcraft distributor who had financed the aircraft through a lender by means of a conditional sales contract. The lender, prior to the sale of the aircraft, had duly filed the contract setting forth his interest with the Federal Aviation Administration under 49 USC 1403. The purchaser failed to check the record before his purchase. Pursuant to the terms of the security instrument, the lender took possession of the aircraft upon its unauthorized sale to the purchaser. The trial court's decision in favor of the purchaser was overturned by the California Supreme Court. In so doing, the Court found that 49 USC 1403 superceded state law protecting a buyer from a dealer. The buyer took subject to the previously recorded security interest of the lender. 49 USC 1403 provides for the central recordation of "any conveyance which affects the title to, or any interest in, any civil aircraft of the United States." The California Supreme Court, concluded that "the federal statute requiring recordation and providing for the effect to be given to instruments not recorded pursuant thereto, preempts any state laws which might otherwise apply..." "We would undermine any federal policy requiring recordation to protect previously acquired aircraft titles if we

held that state law governed the rights of the parties irrespective of recordation." (*Dowell,* supra.)

The Florida District Court of Appeal in June, 1978, faced the pre-emption question in *O'Neill v. Barnett Bank of Jacksonville,* 360 S.2d 150 (Fla. 1st DCA 1978). O'Neill purchased an aircraft from a fixed based operator who had previously financed the aircraft through a lender. The lender had filed his security instruments with the Federal Aviation Administration. The purchaser failed to make the simplest of inquiries to the Federal Aviation Administration regarding prior secured interests in the aircraft before his purchase. Thereafter, the fixed based operator defaulted on the loan and the lender sought possession of the aircraft. The Florida District Court decided the question in keeping with the California Supreme Court and stated:

> "Registration of interests in aircraft is governed by federal law. Federal Aviation Act, 49 U.S.C. 1401, et seq. Section 1403(a)(1) requires the Secretary of Transportation to establish a system for recording any interest in aircraft, including security interests. If the interest is properly registered, the interest shall be valid to all persons without further or other recordation. Section 1403(d). The Substantitive validity of any instrument creating any interest subject to the registration provisions is to be determined by the laws of the state in which the instrument is delivered. Section 1406. The priority of enforceability of interests in aircraft is determined by the federal statute."
>
> *O'Neill,* supra.

The uncertainty and confusion over the effect of recordation under the Federal Aviation Act continues to grow. The

United States District Court of Appeals, Third Circuit, in *Sanders v. M.D. Aircraft Sales Inc. and General Electric Credit Corporation,* 575 F.2d 1086, 3rd Circuit (1978), reached the opposite result of the California and Florida courts. A properly recorded security interest under the Federal Aviation Act was not given priority over interests created by state law. The buyer took free of the interests recorded with the Federal Aviation Administration.

This state by state, court by court, interpretation of the effects of 49 USC 1403 is causing confusion within the entire aviation industry, lenders and purchasers alike. In dealing with a mobile chattel such as aircraft, a difference of interpretation of the status of title in such aircraft based on state laws is an intolerable situation. The varying principles of the California Courts, the Florida Courts, the United States District Courts and the Tennessee Court will remain in direct conflict without the direction of this court.[1]

This growing difference of opinion of the effect of recordation in the face of state laws which displace such previous interests, affects not only the purchase and

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[1]See *First National Commerce and Finance Co. v. The Indiana National Bank,* Florida 3d District Court of Appeal, July 5, 1978; *In re Veterans Express Co.,* 76 F.Supp. 684; *Marsden v. Southern Flight Service, Inc.,* 227 F.Supp. 411 (MDNC 1961); *Dawson v. General Discount Corporation,* 82 Ga.App. 29, 60 S.E.2d 653 (1950), in support of the position set forth in California and Florida. In direct conflict are *Cessna Finance Corporation v. Skyways Enterprises Inc., and First Security National Bank and Trust Co.,* Kentucky Court of Appeals, April 21, 1978; and the decisions of the United States District Court in *Texas National Bank of Houston v. Aufderheide,* 235 F.Supp. 599 (E.D. Ark. 1965); *Sanders v. M. D. Aircraft Sales Inc., and General Electric Credit Corporation,* U.S. Crt. of Appeals, 3d Circuit, May 3, 1978; *Haynes v. General Elec. Credit Corp.,* (1977) 432 F.Supp. 763.

sale of aircraft within the United States, but undermines the quest for certainty of title throughout the world. The United States, as a party to several international treaties, has pledged its support to the establishment of national aviation registries so that all nations may have a ready reference in a single identifiable place, for the determination of the rights in aircraft. The Convention on International Civil Aviation, ratified by the United States on August 9, 1946, and signed by 142 other nations states:

> "Chapter III. Nationality of Aircraft . . . Article 21. Report of Registrations "Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State."

The Convention on the International Recognition of Rights in Aircraft, signed by the United States in 1948, further sets forth the intention to establish one central record for each signatory nation regarding interests in aircraft. (Set forth at length in Appendix.)

The certainty of title as sought under such treaties cannot be established as long as the conflict in the interpretation of the effect of recordation under the Federal Aviation Act continues to exist.

It is respectfully submitted that the Court of Appeals of the State of Tennessee is in error and that the position of the California Supreme Court that "section 1403 provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft title and

to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system. If prior recorded interests are not protected against subsequent buyers who fail to search title, the federal policy in favor of the recordation of aircraft titles will be frustrated . . ." (*Dowell,* supra.)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals of the State of Tennessee.

Respectfully submitted,

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Dated: November 27, 1978.

(Appendix Follows)

APPENDIX

APPENDIX

Convention on the International Recognition of Rights in Aircraft (The Mortgage Convention), Geneva, Switzerland, 1948, Articles I, II and III.

"Article I

(1) The Contracting States undertake to recognize:

(a) rights of property in aircraft;

(b) rights to acquire aircraft by purchase coupled with possession of the aircraft;

(c) rights to possession of aircraft under leases of six months or more;

(d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

(i) have been constituted in accordance with the law of the Constracting State in which the aircraft was registered as to nationality at the time of their constitution, and

(ii) are regularly recorded in a public record of the Contracting State in which the aircraft was registered as to nationality.

The regularity of successive recordings in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to nationality at the time of each recording.

(2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not ad-

mit or recognize any right as taking priority over the rights mentioned in paragraph (1) of this Article.

Article II

(1) All recordings relating to a given aircraft must appear in the same record.

(2) Except as otherwise provided in this Convention, the effects of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

(3) A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law.

Article III

(1) The address of the authority responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts of the particulars recorded. Such copies of extracts shall constitute prima facie evidence of the contents of the record.

(3) If the law of a Contracting State provides that the filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.

(4) Reasonable charges may be made for services performed by the authority maintaining the record."